No. 15873

In the United States Court of Appeals for the Ninth Circuit

UNITED STATES, APPELLANT,

v.

E. B. HOUGHAM, ET AL., APPELLEES

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA, NORTHERN DIVISION

PETITION FOR REHEARING

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CITATIONS

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PETITION FOR REHEARING

Pursuant to Rule 23 of this Court, the United States respectfully petitions for a rehearing on its appeal[1] in the above-entitled case. The judgment of this Court was entered on April 14, 1959.

The basis for the petition is that this Court's ruling against the Government is based on a ground which was neither briefed nor argued by either party, and which we believe to be unquestionably wrong.

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[1] The defendants in the court below also appealed. This Court's affirmance of the judgment of the district court as to that appeal is plainly correct and foreshadowed an identical ruling by the Supreme Court on April 20, 1959 on the very same issue. *Koller* v. *United States*, —— U.S. ——, 27 U.S. Law Week 4280.

1. The only issue raised by the Government in its appeal was whether the Government was limited in its recovery to damages under the first statutory alternative of Section 26(b) of the Surplus Property Act of 1944[2] because of the fact that the ad damnum in its initial complaint sought relief under the first statutory alternative. The district court had ruled that

> * * * since the United States sought damages under the provisions of Section 26(b)(1) in the original complaint, that such is an irrevocable election; that the plaintiff United States cannot thereafter amend its complaint to seek liquidated damages under the provisions of Section 26(b)(2), or otherwise elect to receive liquidated damages under the provisions of Section 26(b)(2), * * * (R. 117).

On appeal, the Government contended only that this ruling with respect to an election of remedies was erroneous and that, having proved its case, it was entitled to elect to recover under the second statutory alternative.

In its opinion this Court appears to agree with the Government's contention that the Government was not foreclosed from seeking relief under the second statutory alternative because of an earlier election of remedies. This Court stated:

> * * * The amount of recovery prayed for had no effect upon substance of the claim. If a cause of action was stated, based upon the statute, the amount of recovery would be based upon the

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[2] 58 Stat. 765, 50 U.S.C. App. (1946 ed.) 1661, *et seq.*

> proof. The statute gave the United States three different measures of damages. Under the Federal Rules of Civil Procedure, at the end of the trial the government would be entitled to that which the court found was established by the evidence.
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> * * * * *
>
> * * * Based upon the proof at the end of the case, the government could recover damages in one of three forms. * * *

However, this Court went on to hold that the choice as to which of the three remedies was to be applied was to be made, not by the Government, but by the court:

> Since then these provisos give liquidated damages in various forms, the trial court had the power to give that form of relief to which he believed the government was entitled. * * *

Throughout this case both parties have assumed that, if the Government was not foreclosed by the prayer for relief in its initial complaint, the Government, and not the court, was entitled to decide which statutory remedy would be applied. Nowhere have the defendants argued that the choice of statutory remedy is a question within the trial court's discretion.

2. We believe that the court's determination of this question—neither briefed nor argued until this time—is erroneous; that it conflicts with the plain words of the statute, with the legislative history of Section 26, and with the consistent administration of this statute for over fifteen years.

Section 26(b) of the Act, containing the three alternative statutory remedies, specifically states that the

Government may recover under the second or third alternatives "* * * if the *United States* shall so elect * * *" [emphasis supplied]. Congress did not state that the second and third alternatives were to be applied where, in the court's discretion, either of these remedies was considered appropriate. Instead, the determination was specifically delegated to the Government.

This Court in its opinion suggests that the quoted language was inserted to show the noncumulative and alternative nature of the three remedies. However, the alternative nature of the remedies is clearly and indisputably demonstrated not only by the nature of the remedies themselves but by the fact that the three remedies are connected in the statute by the disjunctive "or". In the face of this plain and incontestable indication that the remedies are alternative and noncumulative, there was no need for additional surplusage subtly to imply that fact. On the contrary, the quoted language was inserted, as the plain meaning of the words demonstrates, to indicate that the choice of remedy is the Government's choice.

That the choice of remedy is the Government's, and not the court's, is further demonstrated by the legislative history of Section 26(b). As the Senate Report on the bill which became the Surplus Property Act states, "The *United States* is given the option of electing among three different measures of damages" [emphasis supplied], S. Rept. 1057, 78th Cong., 2d Sess., p. 14. It would be difficult for Congress to have expressed itself more clearly.

In the fifteen years since the Act has been passed, the Government has exercised this option in every one of the thousands of fraud cases instituted under this Act.

This is the first time that its right to do so has been questioned. Accordingly, the question has never been discussed specifically in court opinions. Nevertheless, in numerous judicial discussions of the Surplus Property Act, courts have reflected their understanding that the choice of remedies under the statute was the Government's choice. For example, in the leading case of *Rex Trailer Co.* v. *United States,* 350 U.S. 148, 150, the Supreme Court noted that, "The United States limited itself to the recovery of the sum of $2,000 for each of the five overt acts alleged in its complaint". In *United States* v. *Doman,* 255 F. 2d 865, 869 (C.A. 3), affirmed *sub nom. Koller* v. *United States,* — U.S. —, 27 U.S. Law Week 4280 (decided April 20, 1959), the Third Circuit stated that, "the *United States* was to have the option of selecting as its remedy any one of the three different measures of damages" [emphasis supplied]. The holding in *Bernstein* v. *United States,* 256 F. 2d 697 (C.A. 10), also reflects that court's understanding that the Government was to have its, and not the court's, choice of remedy. There, as here, the district court had ruled that the Government had elected its choice of remedy by filing its initial complaint. The Tenth Circuit reversed this ruling and ordered payment to the Government on a larger basis than that permitted by the district court. The Tenth Circuit did not remand the case to the lower court to permit it to apply that remedy which in its discretion seemed most appropriate.

3. In its opinion here, this Court reasoned that if the Government were permitted to choose the applicable remedy, the proviso would constitute "a criminal penalty". However, any doubt as to the nature of the

remedies provided by 26(b) has now been resolved by the Supreme Court's decision in *Koller* v. *United States,* — U.S. —, 27 U.S. Law Week 4280 (decided April 20, 1959). That these remedies are alternatives available to the Government, that one is a multiple of the actual damage suffered by the Government, that another is for a fixed sum for each violation, that another is for a multiple of the consideration paid for the fraudulently-obtained property—none of these facts affects the conclusion that this entire and elaborate structure is intended as liquidated damages to insure "the government complete indemnity for the injuries done it", *United States ex rel. Marcus* v. *Hess,* 317 U.S. 537, 549. "The inherent difficulty of choosing a proper specific sum which would give full restitution was a problem for Congress", *United States ex rel. Marcus* v. *Hess, supra* at 552. *Koller* v. *United States, supra; Rex Trailer Co.* v. *United States, supra.* That the Government may choose any one of the liquidated damage provisions under which to recover is simply to insure that the Government will be made whole. Allowing it to do so does not make the provision penal.

This Court appears to have proceeded on the assumption that recovery under the first statutory alternative is more appropriate here than the second alternative because of the fact that the Government has proved no actual damages. However, if this reasoning were applied to all cases, the second statutory alternative would never be used for if it is inappropriate where the Government proves no actual damages, it is equally inappropriate where the Government proves actual damages and may recover a multiple thereof under the first statutory alternative. The plain fact is that the Government's failure to prove any actual damages has no

relevance to the appropriateness of any of the statutory alternatives. Application of the second statutory alternative does not depend on proof of actual damages. To entitle the Government to recovery under the second alternative, the Government must establish, in addition to fraud, *only* the amount of the consideration.

Moreover, it should not pass without mention that the Government's failure to prove actual damages here does not mean that the Government has not been in fact damaged. As the Supreme Court noted in *Rex Trailer Co.* v. *United States,* 350 U.S. 148, 153-154:

> It is obvious that injury to the Government resulted from the Rex Trailer Company's fraudulent purchase of trucks. It precluded bona fide sales to veterans, decreased the number of motor vehicles available to Government agencies, and tended to promote undesirable speculation. The damages resulting from this injury may be difficult or impossible to ascertain, but it is the function of liquidated damages to provide a measure of recovery in such circumstances. * * *

In order to help certified veterans in their readjustment to civilian life, the Government was willing to sell these vehicles to them at a price substantially lower than that which the vehicles would bring in the open market. But the Government was *not* willing to sell these motor vehicles generally to those not entitled to priority, and even if it were, there is no indication that it would have been willing to sell the vehicles generally at the same price and under the same conditions. In these circumstances, petitioners' fraudulent misrepresentations had the effect not only of inducing the Government to sell the vehicles to a person with whom it had no in-

tention of dealing, but also of selling the vehicles at lower than market prices to a person not entitled to priority. Plainly, this caused damage to the Government and its interests, and hindered the fulfillment of the high aims Congress set for the Surplus Property Act.

In addition, by fraudulently procuring the vehicles, petitioners reduced the number of surplus vehicles in the hands of the War Assets Administration. As a result, some Government agency which was entitled to priority may very well have been compelled to purchase vehicles at the higher market price. While Congress was agreeable to that result as far as veterans were concerned, it intended that Government agencies have top priority—after veterans—to guard against precisely such a result so far as other purchasers were concerned.[3]

Moreover, the Government may well have suffered actual damage here which it could not prove. The Government is not always able to establish the market value of limitless articles of fraudulently-obtained surplus property as of the time it was sold, nor is it always able to determine the enormous profits often made on resale of this property. In another case in which the Government was not able to establish the amount of its actual damages, the Supreme Court stated that, "It seems quite probable that there is also an element of unjust enrichment to the Rex Trailer

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[3] S. Rept. 1142, 79th Cong., 2d Sess., p. 3, lists the priorities as follows:

1. Property set aside for veterans.
2. Federal Government.
3. Veterans generally.
4. Small business.
5. States and their political subdivisions and instrumentalities.

Company from its fraudulent purchases. The record is silent on this point and we have not considered it in arriving at our decision, but the fact that Rex was willing to resort to fraud to purchase the vehicles at the veteran's price strongly suggests an unfair gain from the purchases." *Rex Trailer Co.* v. *United States,* 350 U.S. 148, 153, n. 6. Moreover, experience in other cases of this type indicates the vast fortunes that are sometimes made through veterans-front surplus property frauds. For example, in one recent case (*Bernstein* v. *United States,* 256 F. 2d 697 (C.A. 10)) the defendant paid less than $20,000 for surplus property heaters, less than one-fourth the amount paid for the property in this case, and later resold them at over $168,000.

This Court also expressed the view that the second statutory alternative would be more appropriately applied to a case in which the property had not passed, but a consideration had been agreed upon. Such a case most likely can never arise. If the second statutory alternative were only applied in cases where the property has not passed, it would probably be nugatory and Congress would have performed a vain act by including it in the statute. For payment of the full purchase price and delivery at these surplus property sales occur almost simultaneously. For example, it will be noted that in this case it was necessary for the veterans to have cash or cashiers' checks with them at the time of the purchase. Moreover, Congress recognized as "clear that the bulk of the offenses cognizable under this statute will not be apprehended or investigated until the end of the war", S. Rept. 1057, 78th Cong., 2d Sess., p. 14. In these circumstances, it

is inconceivable that Congress would include a remedy applicable only in cases where the fraudulently-obtained property has not passed.

For the above reasons, we submit that the petition for rehearing should be granted. In accordance with the last paragraph of Rule 23 of this Court, the Government suggests that the case be reheard en banc.

Respectfully submitted,

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APRIL, 1959.

CERTIFICATE OF COUNSEL

I hereby certify that in my judgment the foregoing petition for rehearing is well founded and that it is not interposed for delay.

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